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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 634

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH,
Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
BRIEF IN SUPPORT THEREOF.

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INDEX.

125403

Cases Cited.

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To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

The Baltimore and Ohio Railroad Company, a Maryland corporation, respectfully petitioning, shows to the Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This action was brought by the respondent as plaintiff below against the petitioner to recover for injuries to and the wrongful death of Wilma Winland in the Common Pleas Court of Belmont County, Ohio and was removed to the United States District Court for the Southern District of Ohio, Eastern Division, by petitioner. The case was consolidated for trial in the District Court with an action brought by Thomas Winland, husband of Wilma Winland, against the Railroad Company for personal injuries and property damage. Both cases resulted from petitioner's train striking an automobile driven by Thomas Winland, in which Wilma Winland, respondent's decedent, was riding

in the front seat, at a crossing in Belmont County, Ohio. In the District Court the trial resulted in judgments in favor of Thomas Winland for $1,500 and the respondent for $15,000. Both cases were appealed to the Circuit Court of Appeals for the Sixth Circuit by the petitioner. The Circuit Court of Appeals affirmed the judgment against petitioner in behalf of the respondent (R. 209), but reversed the judgment against the Railroad Company in behalf of Thomas Winland, holding that the District Court erred (a) "in not directing a verdict for appellant (petitioner here) at the close of all the evidence," and (b) in including the doctrine of "last clear chance" in its instructions to the jury, and remanded the Thomas Winland case to the District Court for a new trial (R. 217).

The opinion of the Circuit Court of Appeals (112 F. (2d) 518, R. 211-217) contains an accurate and complete recital of the factual evidence in the record except that it fails to mention one important item of undisputed evidence as hereinafter noted. The opinion states (pp. 519-20, R. 211-13):

> "On Sunday, February 7, 1937, Winland and his wife, Wilma, took his tools to the Stanley Mine, in Belmont County, Ohio, where he was to begin work as a coal miner the following morning. On their return, while crossing appellant's railroad tracks, the 1930 Chevrolet Sedan in which they were travelling was struck by appellant's train. Mrs. Winland was killed and Winland suffered personal injuries and damages to his car.
>
> "The only road from the mine to the main highway is a somewhat tortuous and hilly one. Bearing generally southwest, it crosses appellant's tracks, which run in a southeasterly and northwesterly direction, at a 60° angle. As it nears the scene of the accident it is lower than the tracks, but for a distance of thirty feet adjacent thereto is on the same level. The traveler's view to the west is obstructed by a wooded embankment on his right until he is near the tracks. Appellant introduced evidence to show that a pedes-

trian standing in the road fifteen feet from the tracks could see a man six feet tall walking westerly on the eastbound track until he had gone 496 feet from the intersection; at a distance of ten feet, he could see him 521 feet from the crossing, and from the first, or westbound, track, he could see him 561 feet away. Winland, who was driving, testified that he stopped his car five or six feet from the first, or westbound, track; *that both he and his wife looked each way and listened; that neither saw or heard the train*; that he put his car in low gear and crossed the first track, looking to the east, or his left, as he did so; that, as he started to cross the second, or eastbound, track, he looked again to the west, or to his right, and for the first time saw the train; that it was approaching at about forty-five miles an hour, but that he could not tell how far away it then was; that his car was moving about five miles an hour; that the collision occurred about two seconds after he started his car and about two feet from the point at which he first observed the train; and that he could have stopped his car within a foot at the rate of speed he was going. Appellant's engineer, fireman and brakeman contradict Winland's testimony, which was corroborated by three nearby residents, that the train's whistle was not blown immediately before the accident. The crew does not claim, however, that the whistle was blown at a distance greater than 1,200 feet from the crossing, or that the bell was rung at all; hence, it must be assumed that appellant violated Ohio General Code, § 8853, and was thereby guilty of negligence *per se*.

"The train involved in the accident consisted of an engine, one hundred empty freight cars and a caboose. Appellant's uncontradicted expert testimony shows that air brakes become operative upon a locomotive about three seconds after they are applied, and upon the rest of the train at the rate of about ten cars per second; and that a train of this size, travelling at the rate of twenty miles per hour, cannot be stopped in less than five to six hundred feet after the brakes become operative over the whole train.

"The brakeman testified that he was on the brakeman's seat on the left side of the engine, looking ahead

as the train approached the crossing; that he saw the Winland car, then moving about ten miles an hour, when it was about fifteen feet from the first, or westbound, track, the engine then being about 400 feet from the crossing; that, when the car was about five and the engine about 300 feet from the crossing, he, realizing the car was not going to stop, shouted to the engineer to stop, and immediately heard the air brakes being applied; that he felt the train begin to slow down about the time the engine hit appellee's car, which had pulled onto the eastbound track and stopped. The members of the crew testified that the train's speed, prior to the application of the brakes, was approximately twenty miles per hour, and this testimony is contradicted only by Winland's estimate. It is undisputed that the engine stopped less than 500 feet from the crossing." (Italics ours.)

However, the opinion makes no mention of one other item of undisputed evidence in the record having to do with the actions of Wilma Winland after the automobile started in motion and while it was in the act of crossing the tracks. This appeared on the direct examination of Thomas Winland who first testified that as the automobile approached the crossing, he brought it to a dead stop about five or six feet before reaching the westbound track. He then said: "*We both* looked both ways and listens. *We sees nothing and we hears nothing.*" (R. 54.) He reiterated,—"*We* looked both ways." He then testified that he put his car in low gear and started to cross the tracks. He then said (R. 55):

"I looked down (to the east—toward Blaine) the track, my way was clear, I goes over the westbound track and just before I hits the eastbound track I looks up to see if my way was clear—*me and my wife both.*

Q. What did you see?

A. *We* seen nothing but a train, that is all, when I was on the track just entered over the first rail. (Italics ours.)

* * * * *

Q. Tell the jury how far would you say that train was when you looked around and saw it coming up there.

A. I could not say, I do not know. It was just seconds to me, just like seconds, it seemed like I seen it, and it hit me." (R. 55.)

The respondent's petition contained two causes of action. One for $5,000 for the injuries to Wilma Winland prior to her death, and the other for $25,000 for her wrongful death (R. 5-7). With respect to the wrongful death cause, the jury was instructed that unless they found the husband, Thomas Winland, to be negligent, they should allow such damages as would fairly compensate him for the pecuniary value of her services and assistance (R. 174). Wilma Winland also left a minor daughter by a former husband (who was still living) and at the time of trial the daughter was living with her own father's family.

B. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Section 347(a)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 7, 1940. Its opinion was filed June 11, 1940. The petitioner's petition for rehearing in that court was filed July 9, 1940, and denied November 15, 1940.

C. QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals for the Sixth Circuit, three questions are presented for determination in the event this petition for a writ of certiorari is granted.

1. Should the Circuit Court of Appeals for the Sixth Circuit have reversed the District Court for its failure to direct the jury to return a verdict in favor of the petitioner and against the respondent at the close of all the evidence?

The petitioner contends that the answer to this question should be in the affirmative.

2. Under the evidence, was this case one for the application of the doctrine of "last clear chance" which the District Court charged and the Circuit Court of Appeals for the Sixth Circuit approved? The petitioner contends that the answer to this question should be in the negative.

3. When the Circuit Court of Appeals decided that Thomas Winland, as a matter of law, was guilty of negligence that prevented his recovery, should not the petitioner here be entitled to a new trial in any event under the law of Ohio which denies recovery in a wrongful death action to a beneficiary whose negligence contributed to the death of the decedent? The petitioner contends that this question should be answered in the affirmative.

D. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Sixth Circuit failed to follow and apply the applicable law of the State of Ohio as it was bound to do under the decisions of this Court, to wit, *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *West et al. vs. Am. Tel. and Tel. Co.*, U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, Decided Dec. 9, 1940. The Ohio cases clearly define the duty of a traveler in a vehicle at a railroad crossing. *Detroit, Toledo & Ironton R. R. Co. v. Rohrs*, 114 O. S. 493, 502, and *Lang, Admx. v. Pennsylvania Railroad Co.*, 59 O. App. 345. The duty of a passenger in a vehicle at a railway crossing is likewise clearly defined in *Hocking Valley Railway Co. v. Wykle*, 122 O. S. 391, 395.

The Circuit Court of Appeals also failed to follow and apply applicable decisions of the Supreme Court of Ohio specifically holding that the court should direct a verdict for defendant when plaintiff's own evidence discloses negligence on his part directly contributing to his injury,

or where evidence offered on plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, to wit, *Cleveland Railway Co. v. Wendt,* 120 O. S. 197, 203-4; and failed to follow and apply decisions of this Court and of the Supreme Court of Ohio specifically holding that "last clear chance" has no application where the negligence of the parties is substantially concurrent, and that "last clear chance" can only apply when the defendant actually became aware of the plaintiff's perilous position and thereafter failed to exercise ordinary care to avoid injuring him, to wit, *St. L. Southwestern Ry. Co. vs. Simpson, Admx.,* 286 U. S. 346, *Cleveland Railway Co. v. Masterson,* 126 O. S. 42, and *Brock v. Marlatt, Admx.,* 128 O. S. 435, 439. The Circuit Court of Appeals likewise failed to follow and apply the well established law of the State of Ohio that a beneficiary, who, by his negligence, contributed to the death of the decedent, is not entitled to recover any damages by reason of decedent's wrongful death, to wit, *Wolf, Admr. v. Lake Erie and Western Ry. Co.,* 55 O. S. 517.

These are all important questions of the local law of Ohio and the decision is manifestly in conflict with such decisions, and is likewise manifestly in conflict with decisions of this Honorable Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 8148, The Baltimore and Ohio Railroad Company v. Albert C. Joseph, Administrator of the Estate of Wilma Winland, Deceased"; that the judgment of said United States Circuit Court of Appeals in said cause be reversed by this

Court; and that petitioner have such other and further relief in the premises as to this Court may seem just.

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No. .....

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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vs.

ALBERT C. JOSEPH,
Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported at 112 F. (2d) 518.

The District Court filed no written opinions.

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347(a)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 11, 1940. The petitioner's petition for rehearing in that court was filed July 8, 1940, and denied November 15, 1940.

III.

STATEMENT OF THE CASE.

A full statement of the facts surrounding the accident is contained in the opinion of the Circuit Court of Appeals (112 F. (2d) 518, 519-20, R. 211-213) (with one exception) and is set forth, and the omission of one material undisputed fact pointed out, in the petition for a writ of certiorari (*supra*, pp. 2-4), and for brevity such facts are not repeated herein.

In commenting upon those facts, the Circuit Court of Appeals said (pp. 520-1, R. 213-4):

> "* * * Taking the view of the evidence most favorable to Winland, we are nevertheless of the opinion that it was error to submit his case to the jury. The physical facts were such that, had he looked and listened with reasonable care, after stopping his car and before attempting to cross the tracks, as he testified and as the law required, he could not possibly have failed to see or hear the approaching train. * * *
>
> "* * * According to his own estimate of the train's speed and the length of time his machine was in motion, the train must have been in plain view and less than 132 feet from the crossing when he started across.
>
> "However, whether the exercise of reasonable care required Winland to look to the west any time after starting, it is clear that he should have done so when he started his car. At that time, he had an unobstructed view of the track for a distance of between 521 and 561 feet in the direction from which the train was approaching. According to his own estimate of the train's speed, it must have been visible between eight and nine seconds before it reached the crossing, and, according to other evidence in the case, it was visible more than twice that long. Yet, according to his own testimony, only two seconds elapsed between the time he started and when he was struck. The weather was clear, the temperature above freezing, the right front window of his car partially open, and there is no suggestion that he had any impairment of vision, or that there was anything to obstruct his view of the

more than 521 feet of track in the direction from which the train approached. We are of the opinion that no one could come to any conclusion other than that he failed to look to see whether a train was approaching from the west."

The Circuit Court of Appeals disposed of the respondent's case in two paragraphs of its opinion (p. 522, R. 216-7):

"In the appeal from the judgment in favor of Mrs. Winland's estate, other factors must be considered. It cannot be held as a matter of law that her injury could not have occurred had she exercised the reasonable care she was obliged to exercise to protect her own safety. *This required her to look and listen and warn Winland of any train's approach. She too must have seen the train if she looked as required by law*; but appellant had the burden of proving her contributory negligence and was unable to show that she did not warn Winland of the train's approach after she saw or could have seen it, or that she failed to take any step by which the accident could have been avoided. Cf. *Street Railroad Co. v. Nolthenius*, 40 O. S. 376; *Hocking Valley Ry. Co. v. Wykle*, 122 O. S. 391. The District Court did not err in submitting Mrs. Winland's case to the jury on the question of contributory negligence.

"Nor was it error in that suit to include the last clear chance doctrine in the charge to the jury, for, though she may have been negligent in not seeing the approaching train, it is possible that she was thereafter unable to extricate herself from the danger, and that appellant's employees *could have* become aware of her danger soon enough after her negligence ceased to have averted the accident by the use of reasonable care. Cf. *New York, C. and St. L. R. R. Co. v. Kistler*, 66 O. S. 326; *Pennsylvania R. R. Co. v. Crouse*, 286 F. 376 (C. C. A. 6)." (Italics ours.)

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Sixth Circuit erred in each of the following particulars:

1. In failing to reverse the District Court for its action denying petitioner's motion made at the close of all the evidence to arrest the evidence from the jury and direct the jury to return a verdict in favor of petitioner, and in affirming the District Court's action in this respect.

2. In failing to decide, on the factual evidence in the record, that the District Court erred to the prejudice of petitioner in instructing the jury upon the doctrine of "last clear chance," and in affirming the District Court's action in this respect, for, under the respondent's own evidence, it was clear that the negligence of respondent's decedent and petitioner was concurrent; nor were the facts susceptible of the construction that petitioner's agents, after they became aware of the perilous position of respondent's decedent, were thereafter negligent in failing to avoid injuring her.

3. The Circuit Court of Appeals erred in that, having decided that Thomas Winland was negligent as a matter of law, it failed to apply the law of Ohio which denied any recovery to Thomas Winland as a beneficiary in his wife's wrongful death action when it was manifest that the jury in the trial court had followed and applied the instructions of the District Court that unless they found Thomas Winland negligent, they should allow to him such damages as would fairly compensate him for the pecuniary value of her assistance and services, and in affirming the judgment of $15,000 against petitioner.

V.

ARGUMENT.

A. The Circuit Court of Appeals Erred in Failing to Decide that Respondent's Decedent Was Guilty of Negligence that Prevented Her Recovery.

There is a mandatory duty imposed by the law of Ohio upon a traveler crossing a railroad crossing at grade in that State to exercise his senses of sight and hearing for his own safety, and such a traveler is under a duty "to look both ways and listen for the approach of trains; and such looking and listening must be at such time and place and in such manner as will be effective to accomplish the ends designed thereby." *Pennsylvania Railroad Co. v. Rusynik,* 117 O. S. 530 (syllabus 1); and one who looks in the opposite direction from which the train that thereafter injures him is approaching and who fails to look in the direction from which the train is coming because his view is obscured (by smoke in that case) "proceeds at his own risk" and is guilty of such contributory negligence *as a matter of law* as will prevent a recovery (syllabus 3).

The place where such looking and listening must be done is "at the point that will effectively apprise him of danger, which point is *the last place where he could stop the conveyance which he is driving, in time to avert a collision with an approaching train.*" *Lang, Admx. v. Pennsylvania Railroad Co.,* 59 O. App. 345 (syllabus 1), Ohio Bar, December 26, 1938. In that case, at page 351, the court said:

> "In the recent case of *Detroit, Toledo & Ironton Railroad Co. v. Rohrs,* 114 Ohio St. 493, 151 N. E. 714, referring to such duty, it is said:
>
> " 'The duty is definite and is that he must look as well as listen, and that he must look from a point and at a time that will make the looking effective to apprise him whether danger is near or not.' "

In each of the foregoing cases the action was brought by the driver of the vehicle, but a passenger is also required

to use his senses of sight and hearing for his own safety under the circumstances.

In *The Hocking Valley Railway Co. v. Wykle,* 122 O. S. 391, in discussing a passenger's duty, the court said at p. 395:

> "* * * Hence, while one riding as a guest in an automobile is not charged with the duty of being on the lookout for possible dangers, such as devolves upon the driver of the automobile, yet when approaching a known grade railroad crossing *it is his duty to exercise his senses of sight and hearing* as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train and apprise the driver thereof." (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit in previous cases had imposed a similar standard of conduct on a passenger. *Fluckey v. Southern Railway Co.,* 242 Fed. 468 (C. C. A. 6), and *Erie Railroad Co. v. Hurlburt,* 221 Fed. 907 (C. C. A. 6). This latter case has recently been cited with approval by the Supreme Court of Ohio in the case of *Patton v. Pennsylvania Railroad Co.,* 136 O. S. 159, at page 165.

The only evidence in the respondent's case that dealt with the movements of the automobile or the action of its occupants prior to the collision was that of Thomas Winland, the husband of respondent's decedent and driver of the automobile. His testimony has been set forth in the petition for writ of certiorari, *supra,* pages 4-5. He definitely and repeatedly asserted that he *and the respondent's decedent also* were actively engaged in looking for trains before and at the time the automobile was crossing the two tracks of the petitioner. It is clear from the physical facts shown by the evidence and found by the Circuit Court of Appeals, concerning which there is no substantial dispute in the record, that from the point where Mr. Winland testified the automobile stopped, the occupants could see westward along the track a distance of 521 feet or more and

that this distance increased as the traveler approached the track on which the train was coming. Even if the petitioner's train had been approaching at a speed of 45 miles an hour (which is the highest estimate of the speed of the train that appears in the record), the train must have been in full sight of the respondent's decedent for at least eight seconds before the accident. During the time a train at that speed would have traveled some 528 feet. At the speed of the train estimated by petitioner's witnesses (and which is corroborated by the evidence of the distance it traveled before coming to a stop (R. 142)), it would have been in plain sight for more than twice that long. Yet Mr. Winland testified that it was only about two seconds from the time he started his automobile in motion until it was struck (R. 63), that he only traveled about 15 feet and that at all times while moving that distance he could have stopped his car "within a foot" (R. 63-4). He testified that *he and his wife both* looked both ways while the automobile was standing still, that they both looked to the east while crossing the westbound track and that the first time that either of them looked to the west after the car had started in motion was just as they were coming onto the eastbound track (R. 54-5).

> "* * * The looking should usually be just before going upon the crossing, or so near thereto as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track, even though there was a looking farther away when no train was seen approaching." *Railroad Co. v. Kistler*, 66 O. S. 326, 336.

It would be difficult to conceive of a clearer instance of negligence on the part of respondent's decedent than is shown by this record. The physical facts were such that the train must have been in plain sight at the time the automobile started in motion across the tracks and continued

to be in plain sight until it struck the automobile. The evidence of Mr. Winland is that Wilma Winland was also actively engaged in looking for a train. He was definite and emphatic on this point and there is no evidence to the contrary. The train came from the right side of the automobile. That was the side on which she was seated. She was in a position as good or better than her husband to see it, and she either failed to see it or if she did see it she failed to advise him of its approach. The Circuit Court of Appeals held that she was under a duty to look and listen and warn her husband of the train's approach (R. 216). Obviously the train was in plain view at the time she looked and was so close to the crossing that it reached it within a few seconds. Under such circumstances the statement in the case of *Detroit, Toledo & Ironton Railroad Co. v. Rohrs*, 114 O. S. 493, 502 (1926), *supra*, is particularly pertinent:

> "Surely it will not do for one to claim the right to recover simply because he has looked and did not see, if the conditions are such that, had he looked, he must have seen. When he says he did look, and the conditions establish the fact that any one who looked would have seen, then, if he says he did not see, his own evidence establishes the fact that he did not look, though he may think he did. To hold otherwise would simply be a manifest absurdity, and the doctrine that the traveler in a vehicle upon the highway when coming to a railroad grade crossing must look and listen might as well be abandoned if one so placed, in broad daylight, can say that he looked in a given direction where there was a locomotive moving toward the crossing, and not farther than 75 feet away, and that he could not see it."

It was also said in *The Baltimore & Ohio Railroad v. Heck, Admx.*, 117 O. S. 147:

> "In a suit for wrongful death occasioned by a collision between a railway train and an automobile driven by the decedent, at a crossing at grade of such railway and a public street, where the evidence at the trial tends to prove that the decedent looked just before

driving upon the crossing and tends to prove that the physical facts were such at the time that had he looked he would have seen the oncoming train, it is error for the court to refuse to give to the jury a requested charge, made in writing, before argument, to the effect that notwithstanding the jury finds the evidence to be that the decedent looked just before he drove upon the crossing, *plaintiff cannot recover if the jury further finds that the physical facts were such that had he looked he must have seen the oncoming train in time to have avoided the collision.*" (Italics ours.)

Nor did it appear that Mrs. Winland saw the train and warned her husband and that he ignored her warning. In fact, the only rational conclusion that can be drawn from his evidence is that no warning of any kind was given by her.

The Ohio rule with respect to the standard of care to be exercised by passengers approaching a grade crossing is set forth in the case of *Hocking Valley Railway Co. v. Wykle, supra*, p. 14, at pages 395-6. In substance, though a passenger is not bound to exercise as great a degree of vigilance as a driver, nevertheless, the passenger is required to exercise ordinary care and prudence for his own safety and is under a "duty to exercise his senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train, and apprise the driver thereof." Under the facts of this case as shown by the evidence of the conduct of the occupants of the automobile and the physical facts of the nature of the crossing, it is too plain for serious doubt that Wilma Winland failed to perform the duty with which she was charged by law, of exercising due care for her own safety.

Mrs. Winland was not passively relying upon her husband to do whatever looking and listening was to be done but she herself was actively and independently engaged in looking for a train. The Circuit Court of Appeals for the

Sixth Circuit has said in such a case, to wit, *Erie Railroad Co. v. Hurlburt, supra* (p. 14):

> "Thus it appears that she had voluntarily entered upon the task of looking out for her own safety, and, if her evidence is to be believed, she was using her own eyes and ears for that purpose, wholly independent of her husband, *and was therefore responsible for her own personal negligence. Cotton v. Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Rebillard v. Minneapolis Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9." (Italics ours.)

> "If both of them were engaged in looking and listening for a train, as they evidently were, then the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Railroad v. Kistler*, 66 Ohio St. 327, 64 N. E. 130." (p. 910.)

To the same effect was the case of *Fluckey v. Southern Ry. Co., supra*, p. 14.

The Circuit Court of Appeals in its opinion stated (a) that respondent's decedent was under a duty to look and listen and warn her husband of any train's approach and that had she looked as required by law, she must have seen the train (p. 522, R. 216), and (b) that, under identical physical facts, Thomas Winland was guilty of negligence as a matter of law and could not recover (p. 522, R. 216). But the Circuit Court of Appeals then failed to apply the well established rule that prevails in Ohio that where the plaintiff's own testimony discloses negligence on his part directly contributing to his injury, or where the evidence offered in plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, it is the duty of the trial court to sustain a motion for directed verdict in favor of the defendant. *Cleveland Railway Co. v. Wendt*, 120 O. S. 197, 203-4; *The B. & O. Railroad Co. v. McClellan, Admr.*, 69 O. S. 142; *C. C. C. & St. Louis Ry. Co. v. Lee, Admr.*, 111 O. S. 391; *Buell, Admx. v. New York Central Railroad Co.*, 114 O. S. 40. This Court has held in *Miller vs. Union Pac.*

R. Co., 290 U. S. 227 at p. 232 that, although the burden of proving contributory negligence of plaintiff rests, in all cases, upon the defendant, yet if such contributory negligence be established by plaintiff's evidence the defendant may have the benefit of it in sustaining that burden. The evidence of the conduct of respondent's decedent immediately before entering and while traversing the crossing appeared in the plaintiff's case. Certainly that evidence, which we have commented upon, *supra,* disclosed negligence on the part of respondent's decedent and there was no other evidence offered by plaintiff (and, in fact, none in the entire record) tending to rebut that presumption. In this state of the record we respectfully submit that it is not correct to say, as the Circuit Court of Appeals said in its opinion (p. 522, R. 217), that the burden of proving the negligence of respondent's decedent was on the petitioner and that petitioner had failed to maintain that burden.

It is to ignore the undisputed evidence in the record to conclude that petitioner had not affirmatively proved that respondent's decedent did not see the train until the instant before the crash, and thereby failed to perform her legal duty of exercising ordinary care for her own safety. Under the authority of this Court's decisions, to wit: *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64 and *West et al. vs. Am. Tel. and Tel. Co.,* U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, Decided Dec. 9, 1940, the Circuit Court of Appeals should have followed and applied the law of Ohio and reversed the District Court for its failure to direct a verdict for petitioner.

B. The Circuit Court of Appeals Erred in Deciding that the "Last Clear Chance" Doctrine was Applicable.

"Last clear chance" is only applicable when and if it appears from the evidence that a plaintiff had negligently placed himself in a position exposed to danger and the defendant, *after becoming aware of plaintiff's perilous posi-*

tion, thereafter failed to exercise ordinary care to avoid injuring him. Before that doctrine (designed to excuse culpable negligence on the part of a plaintiff) may be invoked, the evidence must justify the conclusion that the plaintiff's negligence had ceased and that the defendant's negligence was subsequent to that of the plaintiff. It is not to be applied when the negligence of the plaintiff and defendant are concurrent. *Grand Trunk Railway Co. v. Ives,* 144 U. S. 408 (1892); *Chunn v. The City & Suburban Railway of Washington,* 207 U. S. 302 (1907); *Kansas City Southern Railway Co. v. Ellzey,* 275 U. S. 236, 241 (1927); *St. Louis Southwestern Railway Co. v. Simpson, Admx.,* 286 U. S. 346.

In the last case cited this Court, speaking through Mr. Justice Cardozo, said, at pages 350-1, in holding that "last clear chance" was not in the case:

> "* * * There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place, the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory, and was looking at the written orders at the moment of the collision. Negligent he may have been, but not recklessly indifferent to a duty to counteract *a peril perceived and understood. Woloszynowski v. N. Y. C. R. Co.,* 254 N. Y. 206; 172 N. E. 471; *Inland & Seaboard Coasting Co. v. Tolson,* 139 U. S. 551, 558. *In the second place, the negligence of the engineer (the plaintiff's decedent) and the negligence of the conductor were substantially concurrent.* The negligence of the engineer was a continuing one (*St. Louis & San Antonio Ry. Co. v. Schumacher,* 152 U. S. 77, 81), for he was under a duty from the moment that he went out on the main track to return to a place of safety. The negligence of the conductor in failing to give warning was not separated by any considerable interval from the consequences to be averted, nor is there any satisfactory proof that warning, if given, would have been effective to avert them. The transaction from start to finish must have been a matter of seconds only. * * * The several acts of neg-

ligence were too closely welded together in time as well as in quality to be viewed as independent. *Kansas City Southern Ry. v. Ellzey,* 275 U. S. 236, 241." (Italics ours.)

The "last clear chance" rule in Ohio has been defined in *The Cleveland Railway Co. v. Masterson,* 126 O. S. 42 (1932), syllabus 1:

"Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, *after becoming aware of plaintiff's perilous situation,* exercise ordinary care to avoid injuring him." (Italics ours.)

And the Supreme Court of Ohio more recently said on the same subject, in *Brock v. Marlatt, Admx.,* 128 O. S. 435, 438-9:

"* * * The last clear chance rule has no application to any situation except where the injured party through his own negligence has placed himself in a position of peril. The doctrine presupposes his antecedent fault and negligence, as a result of which he is in a place of peril. His negligence does not absolve the defendant from liability, if, knowing such peril, defendant fails thereafter to exercise ordinary care to avoid causing injury. Such charge is not proper where the claimed negligence of the defendant and the contributory negligence of the plaintiff are concurrent."

"* * * Without fully reviewing the evidence in the record it is sufficient to say that in so far as the evidence indicated contributory negligence of the plaintiff's decedent it was continuing and concurrent with the acts of the defendant charged to have been negligent. It had not ceased for a sufficient time prior to the accident to enable the defendant, after she knew of the peril of the decedent, to avoid the accident, and *hence the rule of the last clear chance has no application and its injection into the case is prejudicially erroneous. Pennsylvania Co. v. Hart,* 101 Ohio St. 196, 128 N. E. 142." (Italics ours.)

Under the evidence in this case it is apparent that the negligence of respondent's decedent continued until practically the instant of the accident. At the speed the automobile was moving it could have been stopped clear of the track on which the train was traveling if respondent's decedent had looked to the west even while the automobile was crossing the first of the two tracks. Obviously, under such circumstances, it could not be said that the negligence of respondent's decedent had ceased a sufficient time before the accident so that petitioner's employees, after they saw that respondent's decedent and her husband were in a perilous position, could have successfully averted the accident. On the contrary, the evidence is clear that everything that could have been done by them was done to stop or retard the speed of the train.

At the time it first became apparent to the defendant's head brakeman that the automobile was not going to stop short of the track, the train was from 280 to 320 feet away. Even then the automobile could have been stopped clear of the track if the occupants or either of them had looked. The train, on the contrary, at that distance could not have been stopped short of the crossing. Everything that could be done was immediately done by the engineer to stop it, for he applied the air brake in emergency and turned on the sanders, immediately upon being advised by the brakeman of the presence of the automobile (R. 99-100, 125, 130). The brakeman warned the engineer to stop as soon as it became apparent to him that the automobile was not going to stop short of the track (R. 124). He was under no duty to give any such warning unless and until that fact did appear. In *Railroad Co. v. Kistler,* 66 O. S. 326, it was said at page 340:

> "* * * Or if the fireman and brakeman riding on the left side of the engine saw her, and saw and realized her danger in time to notify the engineer in time to enable him to so slow down or stop the train as to have prevented the injury, and failed to so notify the engi-

neer, such failure would be such negligence as would sustain a recovery; *but if, after it became evident to them that she was about to drive upon the crossing, there was not time to notify the engineer, and then time for him to so slow down or stop the train as to prevent the injury, there could be no recovery.*

"When the fireman and brakeman saw her driving toward the crossing, they had a right to rely that she would use due care and not go upon the crossing, and it was only when it became evident that she was going upon the crossing that the duty devolved upon them to notify the engineer, and if there was then time to save her, she should have been saved; but if it was then too late to save her, the injury was, as to the railroad company, an inevitable accident, and for such there can be no recovery." (Italics ours.)

This train could not have been stopped in less than 500 or 600 feet after the air brakes became effective over the entire train, which, according to the undisputed testimony, would be some ten or twelve seconds after they were applied (R. 142). At a speed of 20 miles an hour, the application of the air 320 feet west of the crossing would not bring the train to a stop until the locomotive had gone more than 500 feet over the crossing, for at that speed the train would travel from 300 to 360 feet before the air became effective over the entire train, and thereafter it would travel 500 to 600 feet more before stopping. If the train had been traveling at the higher speed estimated by Mr. Winland, the distance required for stopping would have been considerably greater. Obviously, under such circumstances, there was no failure of the defendant to exercise ordinary care after it "perceived and understood" the perilous position of respondent's decedent.

The opinion of the Circuit Court of Appeals states in part (p. 522):

"* * * it is possible * * * that appellant's employees *could have* become aware of her danger soon enough after her negligence ceased to have averted the accident by the use of reasonable care." (Italics ours.)

This Court and the Supreme Court of Ohio have unequivocally held that "last clear chance" is only applicable in any event where the *defendant actually was aware of* the plaintiff's perilous position. *St. Louis Southwestern Ry. Co. v. Simpson, Admx., supra,* p. 20; *Cleveland Railway Co. v. Masterson, supra,* p. 21; and *Brock v. Marlatt, Admx., supra,* p. 21. That point was not reached until petitioner's head brakeman realized that the automobile was not stopping but was undertaking to proceed over the crossing ahead of the train, and, as he then testified, he immediately warned the engineer and the brakes were instantly applied.

The Supreme Court of Ohio has held, in *Pennsylvania Co. v. Hart,* 101 O. S. 196 (syllabus 1):

> "It is error for the trial court in his charge to the jury to charge the doctrine of 'last clear chance' where there is no evidence tending to prove a state of facts bringing the case within the rule."

and this statement has been reiterated and reaffirmed by the Supreme Court of Ohio more recently in *Brock v. Marlatt, supra,* p. 21. Erroneously injecting the doctrine of "last clear chance" into the charge to the jury permeates the entire charge and requires a reversal. Nor can a general verdict in such event be upheld under the so-called "two issue rule" in Ohio. *Cleveland Railway Co. v. Masterson,* 126 O. S. 42 (syllabus 5):

> "Where a general verdict is rendered finding for the plaintiff, and the trial court errs in its instructions regarding the duty of the defendant under the last chance rule, the two issue rule cannot be relied on to uphold the verdict."

It has also long been the rule in the United States Courts, independently of the rule in Ohio, that it is reversible error to charge on a theory alleged in the pleadings but not supported by substantial evidence. *Gerber, et al. v. Borderland Coal Sales Co.,* 5 F. (2d) 278 (C. C. A. 6);

Lynch v. United States, 73 F. (2d) 316 (C. C. A. 5); and *Carter v. Carusi,* 112 U. S. 478.

In *B. & O. Railroad Co. v. Reeves,* 10 F. (2d) 329 (C. C. A. 6), the court said (pp. 332-3):

> "The court also submitted the theory of 'last clear chance.' Defendant invited this, and could not complain of its mention; but for guidance in the new trial we should say that the undisputed facts show nothing to support this theory. The engineer was watching the auto approaching the crossing slowly and carefully (plaintiff says at 8 miles per hour), the view between the two was unobstructed, the railroad was in plain sight of the auto driver, and not until the auto came close to the track and did not stop did the engineer have any reason to suppose there was danger. Then he blew an alarm, but it was too late."

A similar comment might be made respecting the evidence in this case.

In this respect also the Circuit Court of Appeals should have applied the law of Ohio as it has been laid down in these Ohio cases and reversed the District Court for its failure so to do, *Erie Railroad Co. vs. Tompkins, supra,* and *West et al. vs. Am. Tel. and Tel. Co., supra,* or, in any event, have applied the limitations upon the "last clear chance" doctrine that have been recognized and applied by this Court in former decisions.

C. The Decision of the Circuit Court of Appeals Permits Thomas Winland to Recover for the Pecuniary Value of His Wife's Services and Assistance Even Though the Law of Ohio Denies a Negligent Beneficiary Any Recovery in a Wrongful Death Action.

The Circuit Court of Appeals held that Thomas Winland was negligent *as a matter of law.* Obviously the negligence of Thomas Winland was one of the contributing factors to the death of respondent's decedent. The respondent's petition embodies two causes of action, one (R.

p. 7) in the amount of $5,000 for Mrs. Winland's pain and suffering from the time of her injury until her death, a matter of approximately two days, and the other (R. pp. 5-7), the statutory action for her wrongful death in the amount of $25,000. In this latter cause the respondent sought to recover for the pecuniary loss sustained by Mrs. Winland's next of kin. The pleadings and evidence (R. pp. 7, 52) show without dispute that her next of kin were her minor child by a former marriage and her husband, Thomas Winland. The District Court was requested by petitioner's counsel to instruct the jury to indicate how much was allowed in the first cause of action and how much in the second cause of action (R. 181), but this the court refused to do. From the fact that the jury returned a general verdict of $15,000 and the pain and suffering cause of action was only for $5,000, it is apparent that at least $10,000 was allowed in the wrongful death cause of action. The Circuit Court of Appeals in its opinion (p. 522, R. 216) has held that the District Court should have directed a verdict for petitioner in the Thomas Winland case. Therefore the District Court in the instant case should have affirmatively charged the jury as a matter of law that in the wrongful death cause of action the jury could not allow any sum whatever in satisfaction of the pecuniary loss sustained by Mr. Winland on account of his negligence. This is clearly the law of Ohio. *Wolf, Admr. v. Lake Erie and Western Ry. Co.*, 55 O. S. 517 (syllabus 3):

> "In such actions (i.e., for wrongful death) the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others, who were not guilty of such negligence."

This rule of law was followed and approved in *Cleveland, Akron & Columbus Ry. Co. v. Workman, Admr.*, 66 O. S. 509, at page 545, and *Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co. v. Grambo, Sr., Admr., 103 O. S. 471, at page 478. Under *Erie Railroad Co. v. Tompkins, supra,* and *West et al. vs. Am. Tel. and Tel. Co., supra,* the District Court and the Circuit Court of Appeals are required to follow and apply the law of Ohio in this respect as well as in the other respects hereinbefore discussed.

The District Court, however, submitted both cases to the jury (R. 161) and charged the jury (R. 174-5) that in measuring the pecuniary loss suffered by Mrs. Winland's beneficiaries, the pecuniary value of her services and assistance to her husband should be taken into consideration by the jury unless the jury found that Mr. Winland was guilty of negligence directly contributing to the death of his wife. The same jury that brought in the verdict of $15,000 in this action, at the same time also brought in a verdict of $1,500 for Mr. Winland in his action, so that obviously the jury in the instant case did not find that Mr. Winland was guilty of contributory negligence, and, in accordance with the trial court's charge, included as a part of its verdict some sum to compensate the husband for the pecuniary loss he sustained by the death of his wife. It is presumed that the jury followed the court's instructions (*C. C. C. & St. Louis Railway Co. v. Grambo, Sr., Admr.*, 103 O. S. 471, 478) and, as they did not find Mr. Winland negligent respecting his own injuries, must have exonerated him from responsibility for the death of his wife. The Circuit Court of Appeals in its opinion held that Mr. Winland was *not* entitled to recover from petitioner for his own damages and said, after discussing the evidence: "We are of the opinion that no one could come to any conclusion other than that he failed to look to see whether a train was approaching from the west." (p. 520, R. 214-5) "* * * The District Court erred in not directing a verdict for appellant at the close of all the evidence." (p. 522, R. 216.) The Circuit Court of Appeals' decision in this respect was entirely warranted by the evidence, but its affirmance of the judgment for respondent in the instant

case presents a patent incongruity, for Mr. Winland, although denied any right to recover for his own physical injuries and property damage, is nevertheless permitted to recover his pecuniary loss for the wrongful death of his wife to which his negligence prominently contributed. Manifestly, the judgment in the instant case denies to petitioner the benefit of a defense to which it is entitled under the law of Ohio, namely, that "the defense of contributory negligence is available as against such beneficiaries (i.e., the husband) as, by their negligence, contributed to the death of the deceased * * *." (*Wolf, Admr. v. Lake Erie and Western Ry. Co., supra.*) The opinion of the Circuit Court of Appeals is silent on this point but it was expressly pointed out to the court in petitioner's petition for rehearing (R. 226-8) which was denied by a majority of the Circuit Court of Appeals (R. 237). Obviously, petitioner should be entitled to a reversal of the judgment of the Circuit Court of Appeals which affirmed the judgment of the District Court in this action.

CONCLUSION.

Petitioner therefore respectfully urges that the prayer of its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in the instant case be granted and that petitioner may have the relief prayed for in said petition.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 634.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH,
Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

PETITION FOR REHEARING.

RAYMOND T. JACKSON,
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Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

In the Supreme Court of the United States

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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vs.

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Administrator of the Estate of Wilma Winland,
deceased,
Respondent.

PETITION FOR REHEARING.

Comes now the above named The Baltimore and Ohio Railroad Company, petitioner, and presents this its petition for a rehearing of its petition for a writ of certiorari in the above entitled cause and in support thereof respectfully shows:

FOREWORD.

Although it may seem an ungracious thing for counsel to seek a rehearing after the Court has denied the petition for writ of certiorari previously filed and presented, the decision of the Circuit Court of Appeals for the Sixth Circuit which the petition for writ of certiorari, denied January 20, 1941, sought to have this Honorable Court review, results in such an incongruous situation and throws such doubt and uncertainty upon the rights and liabilities of petitioner and the duties and responsibilities of passengers in vehicles operating on the highways and across railroad crossings, that counsel for the petitioner feel that in the petition for writ of certiorari they inadequately

presented the issues involved and failed to sufficiently direct this Honorable Court's attention to the principles that should control the determination of those issues and which were overthrown in the instant case, and that it is their duty, as counsel for petitioner, to respectfully ask a reconsideration and rehearing of the matters presented by the petition for writ of certiorari hereinbefore filed.

SPECIFIC REASONS PRESENTED FOR GRANTING THIS PETITION FOR REHEARING.

1. The opinion of the Circuit Court of Appeals for the Sixth Circuit holds that a passenger in a motor vehicle about to cross and in the act of crossing a railroad track, who admittedly was actively undertaking to look and listen for approaching trains and failed to see or hear a train which was in plain sight at a time when the vehicle was still in a place of safety, and which afterwards struck the automobile, which had moved into a place of danger, and injured the passenger, can recover against the railroad company if it was in any way negligent. This obviously seems to be erroneous. If this decision is permitted to stand as a correct exposition of the rules of conduct by which that passenger's and the railroad company's rights are to be determined, it imposes upon the railroad company a far broader and more stringent liability than has heretofore ever been imposed. By the same token, it also relaxes, if it does not completely sweep aside, the standard of care imposed upon a passenger in a vehicle by a long and substantially unbroken line of decisions. It presents a revolutionary change in this broad field. It would permit a passenger to ignore the most obvious dangers with impunity and would impose upon petitioner the extremely onerous burden of becoming a practical insurer of such passenger's safety—a burden as great or greater than that now imposed upon a railroad in carrying passengers for hire.

The Circuit Court of Appeals found it this case that the passenger in the vehicle was actively purporting to look and listen for an approaching train; that she was under a duty to look and listen and warn the driver of any train's approach; that had she looked as required by law, she must have seen the train which was in plain sight; that she did not see or hear it before the automobile started across the crossing; and that the collision occurred about two seconds after the automobile started to move across the tracks. There was undisputed evidence in the record that the passenger did not see the train until the automobile had entered a place of danger and the engine was so close that the accident was inevitable. These facts all appeared in the plaintiff's case in chief. But in the face of all these findings of the Court and this evidence, the Court upheld a recovery for the passenger and held that the matter should have been submitted to the jury on the issue of the plaintiff's contributory negligence and on a charge embodying the doctrine of "last clear chance." That, we respectfully submit, is patently erroneous.

2. The decision of the Circuit Court of Appeals for the Sixth Circuit manifestly fails to follow and apply several applicable principles of law decided by the courts of the State of Ohio and by this Court. We will not burden the Court with any extended argument respecting the numerous legal principles that were ignored in the instant decision but respectfully refer the Court to the argument contained in our brief in support of the petition for writ of certiorari at pages 13 *et seq.*, and to the statement of the reasons relied upon for the allowance of the writ stated at pages 6 and 7 of the petition for writ of certiorari as follows:

> "The Circuit Court of Appeals for the Sixth Circuit failed to follow and apply the applicable law of the State of Ohio as it was bound to do under the decisions of this Court, to wit, *Erie Railroad Co. v. Tompkins,*

304 U. S. 64; *West et al. v. Am. Tel. and Tel. Co.*, U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, decided Dec. 9, 1940. The Ohio cases clearly define the duty of a traveler in a vehicle at a railroad crossing. *Detroit, Toledo & Ironton R. R. Co. v. Rohrs*, 114 O. S. 493, 502, and *Lang, Admx. v. Pennsylvania Railroad Co.*, 59 O. App. 345. The duty of a passenger in a vehicle at a railway crossing is likewise clearly defined in *Hocking Valley Railway Co. v. Wykle*, 122 O. S. 391, 395.

"The Circuit Court of Appeals also failed to follow and apply applicable decisions of the Supreme Court of Ohio specifically holding that the court should direct a verdict for defendant when plaintiff's own evidence discloses negligence on his part directly contributing to his injury, or where evidence offered on plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, to wit, *Cleveland Railway Co. v. Wendt*, 120 O. S. 197, 203-4; and failed to follow and apply decisions of this Court and of the Supreme Court of Ohio specifically holding that 'last clear chance' has no application where the negligence of the parties is substantially concurrent, and that 'last clear chance' can only apply when the defendant actually became aware of the plaintiff's perilous position and thereafter failed to exercise ordinary care to avoid injuring him, to wit, *St. L. Southwestern Ry. Co. v. Simpson, Adm.*, 286 U. S. 346, *Cleveland Railway Co. v. Masterson*, 126 O. S. 42, and *Brock v. Marlatt, Admx.*, 128 O. S. 435, 439. The Circuit Court of Appeals likewise failed to follow and apply the well established law of the State of Ohio that a beneficiary, who, by his negligence, contributed to the death of the decedent, is not entitled to recover any damages by reason of decedent's wrongful death, to wit, *Wolf, Admr. v. Lake Erie and Western Ry. Co.*, 55 O. S. 517.

"These are all important questions of the local law of Ohio and the decision is manifestly in conflict with such decisions, and is likewise manifestly in conflict with decisions of this Honorable Court."

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the petition

for writ of certiorari be reconsidered, and upon such reconsideration thereof, that the petitioner may have the relief therein prayed for.

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Of Counsel.

We hereby certify that the foregoing petition is presented in good faith and not for delay.

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ROY W. LEWIS,
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INDEX.

Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH, ADMINISTRATOR OF THE ESTATE OF WILMA WINLAND, DECEASED,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

As is said by petitioner, the opinion of the Circuit Court of Appeals contains a full statement of the facts in this case, and we have no desire to burden this brief with any repetition; however, some very decisive facts

which petitioner has apparently attached little importance to, will bear repeating.

It must be remembered that respondent's decedent **admittedly** was a **guest** in this automobile and had absolutely no control over its operation at any time.

Although the burden was clearly upon the petitioner to prove contributory negligence on the part of such guest, nevertheless its counsel nowhere in the record asks the driver (Mr. Winland) whether decedent saw the train—or where or when she saw the train—or if or when she called his (Winland's) attention to such train. Nor is there any other attempt on the part of petitioner to show that decedent did not exercise ordinary care under all the facts and circumstances.

Another matter not mentioned in the court's opinion is that plaintiff's exhibits, numbers one (1), two (2) and three (3) on R., 183, 185 and 187, show the dangerous character of this crossing.

One other fact is that the petitioner's own testimony by its train crew shows it violated Ohio General Code Section 8853 and hence it was negligent per se.

ERRORS CLAIMED BY THE PETITIONER.

Petitioner assigns only three errors in the Circuit Court of Appeals as the basis for its petition for a writ of certiorari, the first two of which were submitted to the District Court at the time of trial and on petitioner's motion for a new trial, and in the Circuit Court of Appeals, both on the hearing on the merits and upon the application for a rehearing, and the third assignment was submitted to the Circuit Court of Appeals on the application for a rehearing, and on each occasion, all of such as-

signments were resolved against the contention of the petitioner.

We shall discuss these three assignments of error in the same order in which they appear in the brief of the petitioner.

I. Did the Circuit Court of Appeals Err in Refusing to Decide that Respondent's Decedent Was Guilty of Negligence as a Matter of Law Under the Laws of the State of Ohio?

In its brief, petitioner cites the following well known Ohio cases defining the duty of **a driver** at a grade crossing:

Pennsylvania Railroad Co. v. Rusynik, 117 O. S., 530;
Lang, Admx., v. Pennsylvania Railroad Co., 59 O. App., 345;
D., T. & I. Railroad Co. v. Rohrs, 114 O. S., 493;
Patton v. Pennsylvania Railroad Co., 135 O. S., 159;
Railroad Co. v. Kistler, 66 O. S., 326;
B. & O. Railroad Co. v. Heck, Admx., 117 O. S., 147.

There is no question but what the above-cited cases establish the duty of a **driver** at a railroad crossing in Ohio. The quotations in petitioner's brief from those cases are correct. We shall not repeat them.

The trouble, however, with petitioner's contention is that respondent's **decedent was not a driver** crossing a railroad crossing at grade, and hence any and all of the above cases have no application whatever to the case at bar, as the Circuit Court of Appeals correctly concluded.

Respondent's **decedent was, without dispute, a guest** in the car in which she was riding **and had absolutely no control** or management over the operation of it and, there-

fore, the rule in issue in this case in the trial court and the rule applied by the Circuit Court of Appeals was the rule established by the Supreme Court of Ohio **applicable to a guest or passenger.**

Petitioner urged in the Circuit Court and is now urging here that the law of Ohio applicable to a driver should be applied to the conduct of decedent who was admittedly a guest in spite of the fact the Supreme Court of Ohio has repeatedly and unequivocally said that a very different rule governs the conduct of the guest. The Circuit Court of Appeals refused to misapply the law but did apply the law in this case exactly as it exists in Ohio, as we shall now show.

Now just what is the law in Ohio with reference to the duty of a guest or passenger, as distinguished from the duty of a traveler or driver? The law on this subject is well settled in Ohio in an unbroken line of authorities as follows:

In the case of **Toledo Railway Company v. Mayers**, 93 O. S., 304, the syllabus, which is the law of the case in Ohio, is as follows:

> "Plaintiff was injured as a result of a collision of a street car and an automobile in which he was riding, as the guest of the owner and driver, and in the front seat with him, said collision occurring at an intersection of highways outside the city limits, held:
>
> 1. That the negligence of such driver is not imputable to the plaintiff, and if the collision was caused by the negligent operation of the street car, plaintiff may recover from the operating company unless his own negligent act or omission directly contributed to cause his injury.
>
> 2. Though plaintiff was required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to observe and

avoid the dangers incident to crossing such track, an instruction that he 'was not exonerated from any duty at all by reason of the fact that he himself was not driving the machine' is erroneous."

During the course of the opinion, Matthias, J., says at page 309:

"It has long been the settled law of this state that when one is injured by the wrongful act of another, without concurring negligence upon his own part or by some one who is under his direction or control, he is entitled to recover from him who caused the injury. It is likewise settled that the doctrine of imputed negligence does not obtain in Ohio."

The next case in this line of unbroken authority is the case of **Board of Commissioners v. Bicher, Admx.**, 98 O. S., 432, in which a per curiam decision was handed down. In this case the decedent was a guest of the driver and recovered a verdict against the defendant. In this case, in the Supreme Court, the defendant made exactly the same contention as the petitioner is making here in the instant case, because the defendant there claimed that the trial court erred in refusing to give the following special charge before argument, to wit:

"I now charge you that Mr. Bicher seated as he was in the front seat by the side of Mr. Adams, the driver, was required to reasonably use his faculties of sight and hearing to observe and avoid any impending dangers incident to such driving along a country pike during the nighttime, and apprise the driver of the machine as would a person of reasonable and ordinary prudence under the same or similar circumstances."

In disposing of this contention, which is identical with the contention of the petitioner here, the Supreme Court said at page 437:

> "Plaintiff in error by the request made desired the court to instruct the jury what in the particular circumstances of this case a person of reasonable and ordinary prudence would do. Such a thing can only be determined from the circumstances, **and these the jury must find.** They might find that under the facts of a particular case a person who is not driving, but is merely a guest, might, under the circumstances disclosed in that case, **rely on the driver without being negligent or imprudent.** Especially would this be true if there was nothing in the situation indicating probable danger." (Bold type ours.)

Here we find the Supreme Court of Ohio announcing the rule defining the duty of a guest, and holding that it was not error to refuse a request which embodied exactly the proposition of law for which the petitioner here in the instant case contends.

Furthermore, in the Bicher case, at page 436, the Supreme Court of Ohio in speaking of the Mayers case in 93 O. S., 304, says:

> "In that case, where a guest of the owner and driver was injured, it was held that the negligence of the driver of an automobile which comes into collision with a street car is not imputable to the guest, although the guest is required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to avoid danger incident to crossing the track. **But it is the function of the jury to determine from the facts shown in each case whether the injured person used such care, and what care the circumstances required."** (Bold type ours.)

The next case in this line of authorities by the Supreme Court of Ohio is the case, peculiarly enough, cited

by the petitioner, of **Hocking Valley Railway Company v. Wykle**, 122 O. S., 391.

In the syllabus of this case, which, of course, under the law of Ohio, establishes the law, the court says:

> "One riding as a guest in an automobile **does not assume the responsibilities of the driver**, and the driver's negligence may not be imputed to him. He is required to exercise that care for his own safety which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances, and that test should be applied in an action wherein he seeks to recover damages for injuries sustained in a collision of such automobile and a railroad train at a grade crossing." (Bold type ours.)

This court will find from a reading of the Wykle case that the facts are quite similar to the instant case, and hence we call this court's attention to several pertinent paragraphs in the opinion by Matthias, J., as follows at page 393:

> "From a consideration of the evidence adduced, it must be concluded that the trial court was fully warranted in submitting the issue of contributory negligence to the jury. The evidence must be viewed in its aspect most favorable to the plaintiff, and we shall now refer to only that portion of the record."

At page 394:

> "Counsel for the railway company requested separate instructions covering the duty of the plaintiff as follows:
>
> " 'It was the duty of the plaintiff, riding in the Ford automobile, to use ordinary care in the exercise of his own faculties in looking and listening for a train as the automobile approached the crossing, and such looking and listening should have been at such time and place and in such manner as would be effective to accomplish the ends designed thereby.' "

We call this court's particular attention to the fact that this quoted instruction requested in the Wykle case is exactly the position of the petitioner in the instant case, and the Supreme Court in the Wykle case held that such instruction **was properly refused**, and hence decided that the position of the petitioner in the instant case is untenable, and we call this court's attention to what Matthias, J., said in that case concerning this proposed instruction at page 395:

> "Both of these requested instructions were refused by the trial court.
>
> The question is thus presented as to the duty of a guest in an automobile under the circumstances disclosed by the record and the instruction that should be given the jury in that regard. While the authorities differ somewhat in the statement of the rule governing the conduct of passengers or guests in an automobile and prescribing their duties, all are in accord that the guest in an automobile is not entirely relieved from obligation to exercise care for his own safety. Clearly it is his duty to exercise that care which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances. Hence, while one riding as a guest in an automobile is not charged with the duty of being on the lookout for possible dangers, such as devolves upon the driver of the automobile, yet when approaching a known railroad grade crossing it is his duty to exercise his senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train and apprise the driver thereof. **The conduct of the guest to come within the requirement of ordinary care would differ somewhat under varying circumstances. In that respect the court should not go further in instructing the jury than was indicated in Toledo Railway v. Mayers**, 93 O. S., 304, and **Board of Commissioners v. Bicher, Admx.**, 98 O. S., 432.
>
> It is a matter of common knowledge that under ordinary circumstances **such occupants do largely**

rely upon the driver, who has the exclusive control and management of the vehicle, exercising the required degree of care, and for that reason courts are not justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend upon its own particular facts.

Our conclusion therefore is that the trial court did not commit error prejudicial to the plaintiff in error in refusing to give the instructions above set forth." (Bold type ours.)

Now, under the law as announced by the Supreme Court of Ohio in the Wykle case and the cases preceding it, can it be said that respondent's decedent was guilty of contributory negligence as a matter of law? The testimony in this record, as we have heretofore pointed out, by the husband is that the decedent did look. There is nothing in the record to establish that decedent did not see the train. Likewise there is nothing in the record to show that decedent having seen the train did not call it to the attention of the driver. The record is strangely silent in this regard and nowhere does counsel for the petitioner seek or attempt to establish what the decedent saw or what she did at the time of the accident, in spite of the fact that under the well established law of Ohio the burden of showing contributory negligence is upon the defendant. There is no presumption of decedent's negligence. On the contrary, the presumption is that she was in the exercise of ordinary care. Although the driver was cross examined at great length by petitioner's counsel, not once was he asked what decedent said or did.

Suppose that the decedent did see this train, the inquiry might well be made, as it was made by the Circuit Court of Appeals, as to what the decedent could have done after she saw the train to have avoided the accident.

As indicating that in no event could the respondent's decedent be guilty of contributory negligence as a matter of law under the facts of the instant case, we call this court's attention to a decision of the Supreme Court of Ohio in the case of **Pennsylvania Railroad Co. v. Lindahl**, 111 O. S., 502, at page 510, to wit:

> "Lindahl and Cook, however, were in different situations at the time of the accident. Cook was driving the machine, was familiar with the surroundings, and saw the train before he drove onto the track. Lindahl had no control over the machine and was unfamiliar with the surroundings, and there is no evidence that he had seen the freight cars, if he saw them at all, until just before he jumped from the automobile when it was actually upon the track.
>
> The argument of Cook amounts to a claim that the negligence of Cook should be imputed to Lindahl; that the negligence of Cook was the negligence of Lindahl. However, the doctrine of imputed negligence does not obtain in Ohio. * * * Hence, granting that Cook was negligent in driving onto the track when he saw the train approaching the crossing, this negligence cannot be imputed to Lindahl.
>
> When Lindahl was confronted with the sudden emergency of finding himself in an automobile crossing a track upon which a train was bearing down, he was required to use only that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. **It was a question of fact** whether Lindahl saw the train in time to avoid the accident so far as he was concerned, and used the requisite degree of care, **and that question was rightly submitted to the jury.**" (Bold type ours.)

The burden of proving contributory negligence was upon the defendant in this as in every other case, and yet there is nothing in this record to show that the respondent's decedent did not look, nor is there anything in the record to show that she did not see the train, nor is there anything in the record to show that she did not make

some outcry or give warning to the driver, and yet if she did any one of these things, she would have been exercising ordinary care, as the same has been repeatedly defined by the Supreme Court of Ohio. No one as yet has been so bold as to urge that ordinary care on the part of a guest would require her to grab the steering wheel from the driver, nor would it require her to jump from her side of the automobile under the wheels of the oncoming train.

The question of decedent's negligence was one of fact for the jury and was correctly submitted to the jury by the trial court.

Furthermore, under the law of Ohio, a guest in an automobile is not required to call attention of the driver to any object which appears to the guest at the time to be perfectly apparent to the driver. This accident occurred in broad daylight and certainly respondent's decedent was entitled to assume, if it is necessary to determine what she was legally entitled to assume, that the driver of the car could see the oncoming train, and that it required no warning from her. In this regard, we call the court's attention to the following authorities:

Pennsylvania Railroad Co. v. Lindahl, 111 O. S., 502;
Hocking Valley Railroad Co. v. Wykle, 122 O. S., 39;
Keiner v. W. & L. Erie Company, 34 O. App., 409;
Slee v. Neller, 226 Mich., 151, 197 N. W., 530;
Jerko v. Buffalo Railroad, 275 Pa., 459, 119 Atl., 543;
Schosstein v. Bernstein, 293 Pa., 245, 142 Atl., 342.

Petitioner claims that the Circuit Court of Appeals did not apply the law of Ohio. The fact is that petitioner sought to have the Circuit Court of Appeals apply to re-

spondent's decedent, who was a passenger, the rule of conduct applicable to a driver, and this, of course, the Circuit Court of Appeals refused to do.

The Circuit Court of Appeals did apply to respondent's decedent the rule of law applicable to a guest, as we have attempted to set forth herein, and the Circuit Court of Appeals in its opinion very properly says (R., 216):

> "This required her to look and listen and warn Winland of any train's approach. She too must have seen the train if she looked as required by law; **but appellant had the burden of proving her contributory negligence and was unable to show that she did not warn Winland of the train's approach after she saw or could have seen it, or that she failed to take any step by which the accident could have been avoided.**" (Bold type ours.)

The district court very correctly charged the jury and we quote from its charge as follows:

> "Bearing in mind, however, that if Wilma Winland was guilty of negligence or contributory negligence, such as to be all, or a part of the direct and proximate cause of her own injuries, her administrator, Albert C. Joseph, cannot recover." (R., 167.)

And again:

> "Here again, the court can only say to you, that Mrs. Winland was required to use that degree of care for her own safety which would have been exercised by a reasonably cautious and prudent person under the same or similar circumstances. If she exercised that degree of care, she was not negligent. But if she exercised a lesser degree of care, she was negligent, and if that negligence was the direct and proximate cause of her injuries and death; or if it was a part of the direct and proximate cause, the administrator cannot recover in this action. This is true even though you should find that the defendant was negligent in one or more of the respects claimed by the plaintiffs." (R., 171.)

And again:

> "However, the court desires that you clearly understand, that although the burden of proving contributory negligence is upon the defendant, if the evidence as a whole establishes contributory negligence on the part of either or both Mr. and Mrs. Winland, that fact will avail the defendant as a defense, just as well and as completely as if established by specific evidence offered by the defendant." (R., 172.)

We think that the contributory negligence of respondent's decedent was a question for the jury and the court very fairly and very properly submitted such question.

Furthermore, in the determination of a question such as this, under the law of Ohio, the evidence must be viewed in the light most favorable to the plaintiff. In this respect we quote from the case of **McMurtrie v. Wheeling Traction Company**, 107 O. S., 107, syllabus 1, as follows:

> "I. Where any phase of the facts, as shown by the evidence upon the subject of contributory negligence, will warrant the inference that the plaintiff, at the time of the injury, was exercising due care, it cannot be said that plaintiff was guilty of contributory negligence as a matter of law."

In the opinion by Robertson, J., at page 111, it is said:

> "In arriving then at whether there was any phase of the evidence which would tend to prove the absence of negligence on the part of plaintiff, the court would be required to consider the evidence in its most favorable aspect toward the plaintiff, and in doing so consider the favorable evidence and disregard the unfavorable evidence."

II. Did the Circuit Court of Appeals Err in Deciding THAT THE LAST CLEAR CHANCE DOCTRINE Was Applicable?

Petitioner complains that the trial court erred in submitting to the jury a charge embodying the doctrine of last clear chance and that the Circuit Court of Appeals was in error in holding that such doctrine was properly submitted to the jury.

The law of last clear chance is well settled in Ohio and it would serve no good purpose to analyze the cases cited by the petitioner. With such law we agree. Petitioner makes the point that respondent's decedent was guilty of contributory negligence which was continuous and concurrent with the negligence of the train crew, and that therefore the doctrine had no application. It further contends that even though her negligence was not continuous and concurrent, petitioner did not see decedent in time to have **stopped** its train clear of the crossing.

We think that under the proven facts not only was the doctrine applicable in this case, but that it would have been error for the court to have refused to charge upon it.

Decedent's negligence, if any, could not have been continuous and concurrent with that of the petitioner under the proven facts.

The head brakeman, one Snyder, saw the automobile about 15 feet from the west bound track; the train was then about 10 car lengths from the crossing, which would be about 400 feet; when the automobile was about five feet from the west bound track and still moving, he, Snyder, hollered to the engineer, and he testifies as follows:

> "Q. And when you hollered what did you holler?
> A. Stop, there is an automobile, and as hard as I could holler, and loud.

Q. When you hollered about how far away from the crossing would you say the engine was? A. About seven or eight car lengths.

Q. After you hollered what did you see the automobile do? A. After I hollered why I seen him pull over there and stop.

Q. The automobile? A. Yes." (R., 124.)

Under this testimony of the petitioner itself, it would clearly be its duty to thereafter exercise ordinary care to avoid colliding with this car, and if it did not do so, and such negligence of the respondent's decedent, if any, had ceased, then the doctrine of last clear chance was applicable.

Clearly, decedent being a passenger or guest would have no control over the automobile, and if, as the head brakeman says, the car stopped upon the tracks, it would at least be a question of fact for the jury as to whether there was any negligence at all on the part of a guest, or if there was, whether it had terminated.

The record then very clearly demonstrates that the petitioner's train crew did not thereafter exercise ordinary care to avoid the collision. We shall quote briefly from the record. Although the head brakeman saw this automobile first at a distance of 400 feet (R., 126) **he did not** warn the engineer until the train was about 7 or 8 car lengths from the crossing. (R., 124.) He then hollered to the engineer to stop and he frankly admits that in spite of so doing, the **train did not slacken** its speed until just as it hit the automobile, as is shown by this testimony:

"Q. The way you know the brake went on was because you felt the pull of your train? A. Hear them, hear the air.

Q. Naturally you felt the pull, didn't you? A. Yes.

Q. From the time you heard air going on you noticed your train begin to slacken speed till it finally stopped? A. I didn't feel it slack so much right then.

Q. When did you feel it slacken? A. Felt it slacken a little about the time we hit the car.

Q. You mean this train went on 280 feet, and you did not feel it slacken at all? A. No, sir.

Q. You think you were going just as fast when you hit the automobile as when you hollered? A. Might not have been, but I did not notice it slacken so much."

This is the testimony of the only member of petitioner's train crew that saw this automobile before it was struck, although, admittedly, there were three members of the train crew in the engine.

At page 22 of its brief, petitioner says:

"The train, on the contrary, at that distance could not have been **stopped** short of the crossing. Everything that could be done was immediately done by the engineer to **stop it.**"

This is, to say the least, a misleading statement, because to have avoided this accident, it was not necessary that the train be **stopped short of the crossing.** The automobile, if the story of the driver was correct, was proceeding slowly across the tracks. If the story of the head brakeman, Snyder, is correct, it was proceeding slowly across the track and suddenly stopped on the east bound track, and yet this same brakeman testifies that the speed of the train as it traversed a distance of approximately 300 feet or more after he hollered to the engineer did not **slacken its speed** until just as it struck the automobile. The inference is irresistible, and it is a matter of common knowledge, that as soon as the emergency brakes were applied, this brakeman would have

felt the slackening of the speed, and hence the jury had the right to determine whether or not anything was done by this train crew to either stop **or slacken** the speed of this train in order to avoid colliding with this automobile.

It is perfectly obvious therefore that upon this theory of the case the trial court was clearly correct and the Circuit Court of Appeals was correct in holding that the doctrine of last clear chance was in the case on the facts and properly submitted to the jury.

Furthermore, the exercise of ordinary care not only would have required the petitioner's train crew to have slackened the speed of the train, but would further have required it to give some warning to the driver of the automobile after the forward brakeman admittedly saw it and warned the engineer, and yet it is admitted by all of the train crew that from the time that the forward brakeman hollered to the engineer, no warning of any kind or character was given. Indeed no bell was ever rung on this engine and admittedly so.

Petitioner relies with great confidence upon the testimony of their supervisor of locomotives to the effect that this train could not have been stopped clear of the crossing. This argument of petitioner is based upon the mistaken idea that to have avoided this accident required that the train be stopped, when a mere slackening of its speed would have avoided the accident.

No better illustration of the point we make is available than a quotation from the opinion of the Supreme Court of Ohio in a case cited by petitioner, namely, **Railroad Company v. Kistler**, 66 O. S., 327, at page 340, and we quote, briefly, as follows:

> "If she was negligent in going upon the crossing in front of a rapidly approaching train, thinking that she could cross in safety, and the engineer

after seeing her was negligent **in not slowing down or stopping** his train, thinking that she would get across in safety, the proximate cause of the injury was the miscalculation and negligence of both, and there could be no recovery, unless the engineer after he saw her and realized her danger had time to so slow down or stop as to prevent the injury. Or if the fireman and brakeman riding on the left side of the engine saw her and saw and realized her danger in time to notify the engineer in time **to enable** him to **slow down or stop** the train as to have prevented the injury, and failed to so notify the engineer, such failure would be such negligence as would sustain recovery." (Bold type ours.)

In the instant case, it is perfectly obvious from the petitioner's own testimony that if the air had been applied by the engineer when the brakeman hollered to him, that it would have slackened the speed of this train considerably, even though it be conceded that it would not have stopped short of the crossing, and obviously a very slight slackening of this train or any warning given at that time would have avoided the collision. In any event, such questions were properly submitted to the jury.

All of the elements of the doctrine of last clear chance are present in this case and the court was correct in submitting the same to the jury, and the Circuit Court of Appeals was correct in approving such submission.

In the case of **Pennsylvania Railroad Company v. Crouse**, 286 Fed., 376 (C. C. A. 6), our own Circuit Court of Appeals points out that in a case almost identical with the instant case, where the trainmen did not **promptly enough try to stop** the train, this issue was properly submitted to the jury.

III. Does the Decision of the Circuit Court of Appeals Permit Thomas Winland to Recover for the Pecuniary Value of His Wife's Services Even Though the Law of Ohio Denies a Negligent Beneficiary Any Recovery in a Wrongful Death Action?

In the action in the District Court, an action of Thomas Winland against the B. & O. Railroad Company, and the instant case against the same defendant, were consolidated and tried to the same jury, but separate verdicts were returned.

This court will observe that petitioner is now attempting to treat the two cases as though they were one and the same action, and is attempting to predicate error in the action of the District Court in the instant case by the Thomas Winland case. This we submit cannot be done.

The assignment of error urged here amounts to a contention that the trial court should have charged the jury in the instant case **as a matter of law** that Mr. Winland, one of the beneficiaries, was not entitled to recover any sum whatever for the wrongful death of his wife because of his own negligence.

This same error was urged in the Circuit Court of Appeals under that very title and the Circuit Court of Appeals we think very properly and correctly held that there was no error in the manner in which this question was submitted to the jury in the trial court.

While it is true that the Circuit Court of Appeals in the Winland case, that is the case of the husband, held he was guilty of negligence as a matter of law, nevertheless this petitioner cannot now urge this particular assignment of error, for the reason that in this case the trial court submitted the question of Mr. Winland's negligence

to the jury as affecting his right to recover as a beneficiary, and not only did the trial court submit it correctly, but we shall show that petitioner, in the trial court, requested the charge to be made in that very manner.

In its charge (R., 174 and 175) in this case, the trial court said:

> "There is one circumstance which may materially affect the amount that you can allow under this first cause of action. If you shall determine that Thomas Winland was guilty of contributory negligence which was a part of the direct and proximate cause of the injury and resulting death of Wilma Winland, then you may not award any sum under this cause of action for any pecuniary loss that Thomas Winland may have suffered by reason of the death of Wilma Winland. In such case, the administrator, under this cause of action, would be permitted to recover only for the loss that the child, Winona Richmond, suffered by reason of the death of her mother."

Now for at least two very obvious reasons, from the record, counsel for petitioner is in no position to complain.

First, the appellant did not except to that part of the charge to which it now complains. The only thing petitioner's counsel said with reference to this part of the charge is found on page 179 of the record, as follows:

> "May we have an exception to the matters enumerated by the court in defining to the jury the pecuniary elements of pecuniary loss with respect to the first cause of action in the administrator's case for the wrongful death of Wilma Winland?"

How can this language of petitioner be distorted into an exception to the charge of the court concerning Mr. Winland's right as a beneficiary to recover as is now complained of by petitioner?

The law is well settled that exceptions must be specific so that the court's attention is directly called to the language challenged.

In support of this doctrine, we cite:

Holloway v. Dunham, 170 U. S., 615 at 620;
Newport News Company v. Pace, 158 U. S., 36;
Union Pacific Railroad Co. v. Thomas, 152 Fed., 365;
Price v. Pankhurst, 53 Fed., 312;
Lincoln v. Claflin, 7 Wall. (U. S.), 132; 19 L. Ed., 106;
Cooper v. Schlesinger, 111 U. S., 148, 4 Sup. Ct., 360, 28 L. Ed., 382.

Secondly, the record clearly discloses that petitioner is now complaining of the charge of the trial court not only in respect to something to which it did not except, but petitioner requested the trial court to so charge. Its contention now is clearly an afterthought.

We call this court's attention to petitioner's request for special instructions, No. I (R., 160), as follows:

> "I. If you find that the administrator of the estate of Wilma Winland is entitled to recover for her death, you are instructed that you cannot allow as damages in said cause of action any sum whatever to be apportioned to Thomas Winland if you find that he was guilty of any negligence that directly or proximately contributed in the slightest degree to the accident that caused her death."

The trial court refused to give the above request **before argument**, and strange enough, in view of its present contention, petitioner's counsel excepted to such refusal, but the trial court gave the substance of such request in its general charge, as we have heretofore shown.

How can petitioner now urge that the trial court should have charged that Thomas Winland was guilty of negli-

gence as a matter of law and hence no sum should be allowed to him as a beneficiary when it did not take such position in the trial court, and did not ask the court to so charge, but on the contrary requested the court to charge exactly as it did charge?

Furthermore, we should like to inquire just how petitioner arrives at the conclusion that the decision of the Circuit Court of Appeals permits Thomas Winland to recover anything for the wrongful death of his wife.

Decedent left surviving her Thomas Winland and a minor child, namely, Winona Richmond. The fact that Thomas Winland, as a beneficiary, was negligent, and hence could not share in any verdict or judgment recovered, would not in any way defeat the administrator's right to recover, and there is not a word or syllable in this record to show that the jury allowed anything to Thomas Winland for the wrongful death of his wife. On the contrary, respondent is fortified with the very salutary rule that the presumption is that the jury followed the court's instruction and in the absence of a special finding, petitioner should not be permitted to indulge in the loose conclusion as it does on page 27 of its brief, namely:

> "So that obviously the jury in the instant case did not find that Mr. Winland was guilty of contributory negligence, and, in accordance with the trial court's charge, included as a part of its verdict some sum to compensate the husband for the pecuniary loss he sustained by the death of his wife."

The verdict was general. No special finding was asked by the petitioner.

We submit that when the trial court charged the jury that it could not allow any damages to the husband,

Thomas Winland, if he was negligent and such instruction was in accordance with the request of counsel for the petitioner, and petitioner did not except to such charge, nor did the petitioner request the trial court to charge further, it is now too late for it to raise such question here.

CONCLUSION.

For the reasons set forth herein, respondent respectfully urges that the petition for a writ of certiorari in the instant case should be refused.

Respectfully submitted,

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